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**UNITED STATES BANKRUPTCY COURT
 DISTRICT OF NEVADA**

In re:
 USA COMMERCIAL MORTGAGE COMPANY,
 Debtor.

Case No. BK-S-06-10725 LBR
 Case No. BK-S-06-10726 LBR
 Case No. BK-S-06-10727 LBR
 Case No. BK-S-06-10728 LBR
 Case No. BK-S-06-10729 LBR

In re:
 USA CAPITAL REALTY ADVISORS, LLC,
 Debtor.

Chapter 11
 Jointly Administered Under
 Case No. BK-S-06-10725 LBR

In re:
 USA CAPITAL DIVERSIFIED TRUST DEED
 FUND, LLC,
 Debtor.

Adversary No. 06-1212 LBR

In re:
 USA CAPITAL FIRST TRUST DEED FUND,
 LLC,
 Debtor.

**MOTION TO APPROVE SETTLEMENT
 AND COMPROMISE OF CLAIM**

In re:
 USA SECURITIES, LLC,
 Debtor.

Affects:
☐ All Debtors
☒ USA Commercial Mortgage Company
☐ USA Securities, LLC
☐ USA Capital Realty Advisors, LLC
☐ USA Capital Diversified Trust Deed Fund,
 LLC
☐ USA First Trust Deed Fund, LLC

Date: TBD (OST requested)
Time: TBD
Place: Foley Federal Building
300 Las Vegas Blvd., South
Third Floor
Las Vegas, Nevada 89101

BINFORD MEDICAL DEVELOPERS, LLC, an
 Indiana Limited Liability Company,

Plaintiff,

vs.

BullivantHouserBailey PC
 3883 Howard Hughes Parkway, Suite 550
 Las Vegas, Nevada 89169
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1	COMPASS FINANCIAL PARTNERS, LLC,	
2	and FIDELITY NATIONAL TITLE GROUP,	
3	Defendants.	
4	COMPASS FINANCIAL PARTNERS, LLC,	
5	Counterclaimant,	
6	vs.	
7	BINFORD MEDICAL DEVELOPERS LLC,	
8	an Indiana Limited Liability Company,	
9	Counterdefendant.	

10 Defendant and Counterclaimant, COMPASS FINANCIAL PARTNERS LLC, a Nevada
11 limited liability company ("Compass"), moves this Court for an order approving the settlement
12 of the above-captioned adversary proceeding including the compromise of the claim of Binford
13 Medical Developers LLC ("Binford") asserted by Binford in the Chapter 11 case of USA
14 Commercial Mortgage ("USACM").

15 This motion and is made and based upon Rules 9014 and 9019 of the Federal Rules of
16 Bankruptcy Procedure (the "Bankruptcy Rules") and Rules 9014 and 9019 of the Local Rules of
17 Bankruptcy Procedure for the District of Nevada (the "Local Rules"). This Motion is supported
18 by the Memorandum of Points and Authorities included herein, the attached exhibits, all papers
19 and pleadings on file, and any oral argument the court may consider.

20 **MEMORANDUM OF POINTS AND AUTHORITIES**

21 **I. INTRODUCTION**

22 The duly authorized representatives of Compass and Binford participated in a settlement
23 conference held with Judge Nakagawa on November 6, 2007. As a result of the settlement
24 conference, Compass and Binford were able to resolve the parties' disputes as well as
25 compromise Binford's general unsecured claim against the USACM Liquidating Trust.

26 By and through this motion, Compass seeks an order approving the settlement. The
27 settlement's terms and conditions were put on the record after the settlement conference and
28 were memorialized in a written Settlement Agreement that was prepared in conformity with the

1 settlement terms put on the record. A copy of the Settlement Agreement is attached hereto as
 2 **Exhibit A** and incorporated herein by this reference (the “Settlement Agreement”). The terms
 3 and conditions set forth in the Settlement Agreement are hereinafter sometimes referred to as
 4 the “Settlement”.

5 As part of the Settlement, Binford agreed to reduce its general unsecured claim asserted
 6 in the USACM Chapter 11 case from more than \$3.5 million to \$925,000. Binford’s claim was
 7 asserted by the filing of its Proof of Claim, a copy of which is attached hereto as Exhibit B. By
 8 and through this motion, Compass requests that the Court approve the compromise of the
 9 Binford’s claim, subject to the approval of the USACM Liquidating Trust.

10 **II. FACTUAL AND PROCEDURAL BACKGROUND**

11 1. On or about August 31, 2005 (the “Origination Date”), USACM originated a
 12 commercial loan on behalf of approximately 53 direct lenders (together with direct lenders who
 13 advanced funds to Binford after the Origination Date, the “Direct Lenders”) to Binford in the
 14 principal amount of \$4,250,000.00 (the “Binford Loan”).

15 2. The Binford Loan was intended to finance the construction of a medical office
 16 building to be known as the “Binford Medical Complex” located at 65th Street and Binford
 17 Boulevard in Indianapolis, Indiana (the “Property”).

18 3. Binford’s obligations under the Binford Loan were personally guaranteed by its
 19 principal, Kenneth E. Schmidt (the “Guarantor”).

20 4. The Binford Loan was evidenced by a Construction Loan Agreement, dated
 21 August 31, 2005, between Binford and the Direct Lenders.

22 5. On or about August 31, 2005, Binford executed a Promissory Note Secured by
 23 Mortgage, dated August 31, 2005 (as amended, the “Promissory Note”), in favor of the Direct
 24 Lenders in the amount of \$4,250,000.00.

25 6. On or about August 31, 2005, as collateral for the Promissory Note, Binford
 26 executed a Mortgage, Security Agreement and Assignment of Rents, dated August 31, 2005,
 27 granting the Direct Lenders a first priority mortgage lien upon and security interest in the
 28 Property (the “Mortgage”).

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7. Additional funds were loaned to Binford by the Direct Lenders pursuant to six Amendments to Loan Documents, such that the principal of the Binford Loan was increased to \$7,450,000.00, and the total number of Direct Lenders in the Binford Loan was increased to 92.

8. Pursuant to the Binford Loan documents, on or after August 31, 2005, amounts were forwarded by the Direct Lenders to a construction control account maintained by Fidelity National Title Group ("Fidelity"), the current balance of which is approximately \$330,000.00 (the "Fidelity Escrow Amount").

9. USACM acted as servicer of the Binford Loan on behalf of the Direct Lenders from the Origination Date through February 16, 2007, pursuant to various loan servicing agreements by and between the Direct Lenders, individually, and USACM (the "LSAs").

10. On April 13, 2006, USACM, USA Capital First Trust Deed Fund, LLC ("FTDF"), and three other affiliates of USACM (collectively, the "Debtors") commenced chapter 11 cases in the United States Bankruptcy Court for the District of Nevada (the "Bankruptcy Court"), styled *In re USA Commercial Mortgage Company, et al.*, which were jointly administered under Chapter 11 Case No. BK-S-06-10725 (LBR).

11. On November 7, 2006, Binford commenced an adversary proceeding in the Debtors' chapter 11 cases, styled *Binford Medical Developers, LLC v. USA Commercial Mortgage Company and Fidelity National Title Group*, Adversary No. 06-01212-LBR (the "Adversary Proceeding"), in which Binford alleged breach of contract, breach of the covenant of good faith and fair dealing, intentional misrepresentations, and requested declaratory and injunctive relief against USACM and Fidelity.

12. On November 30, 2006, USACM filed a Counterclaim for Declaratory Relief in the Adversary Proceeding.

13. On January 17, 2007¹, after a hearing on USACM's Motion for Partial Summary Judgment, this Court granted partial summary judgment to USACM ordering that (i) there is no obligation by the Direct Lenders to loan Binford additional funds; (ii) the Direct Lenders have

¹ The Order Granting Partial Summary Judgment was entered August 30, 2007.

1 the right but not the obligation to fund additional monies to Binford; (iii) the failure to loan
2 additional funds to Binford is not a breach by the Direct Lenders of the Binford Loan
3 documents; (iv) the failure of USACM to loan additional funds to Binford under a “side
4 agreement” between USACM and Binford is not the basis for any claim by Binford against the
5 Direct Lenders; and (v) USACM as a loan servicer (but not its successor loan servicer) is
6 estopped from instituting foreclosure proceedings against Binford.

7 14. Effective February 16, 2007, Compass acquired substantially all of the assets of
8 USACM and FTDF, including, among other things, FTDF’s participation as a Direct Lender in
9 the Binford Loan in the principal amount of \$1,285,000.00 and USACM’s rights under each
10 LSA, all accrued default rate interest, servicing fees, late charges, success fees and other fees
11 and sums due the servicer under the LSAs, pursuant to an Asset Purchase Agreement, dated as
12 of December 7, 2006 (the “Sale”), which was approved by the Bankruptcy Court by Order
13 entered January 8, 2007, confirming the Debtors’ chapter 11 plan of reorganization (the “Plan”).

14 15. Binford was served with notice of the proposed Sale, and did not file an objection
15 thereto.

16 16. Compass acquired the Debtors’ assets, including the assets related to the Binford
17 Loan, free and clear of all liens, claims, encumbrances and other interests pursuant to the Plan
18 and 11 U.S.C. §363(f).

19 17. On March 26, 2007, in accordance with Section IV(D)(1) of the Plan, Compass
20 filed a Notice of Election to Prosecute and Defend Pending Litigation, Pursuant to Debtors’
21 Confirmation Chapter 11 Plan of Reorganization, pursuant to which Compass elected to
22 prosecute and defend USACM’s rights in the Adversary Proceeding.

23 18. On or about April 25, 2007, Smith Development and Construction Company,
24 Inc., an Indiana corporation, the general contractor hired by Binford to construct the Binford
25 Medical Complex on the Property (the “Contractor”), filed a Complaint For Declaratory
26 Judgment and Other Relief in the Marion Circuit Court in Indiana (the “Indiana State Court”),
27 naming Binford, Compass, and Fidelity as defendants, and seeking, among other things, entry of
28

1 an order directing that the Fidelity Escrow Amount be paid directly to the Contractor (the “State
2 Court Action”).

3 19. On August 16, 2007, the Indiana State Court entered an Order directing Fidelity
4 to deposit the Fidelity Escrow Amount into the registry of the Indiana State Court, and
5 dismissing Fidelity as a party to the State Court Action, and the Fidelity Escrow Amount was
6 subsequently deposited into the registry of the Indiana State Court.

7 20. On or about July 18, 2007, Compass filed a Cross-Claim against Binford in the
8 State Court Action seeking foreclosure upon the Property in accordance with Indiana law and
9 the Binford Loan documents (the “Foreclosure Action”).

10 21. On November 6, 2007, pursuant to this Court’s Order Scheduling Settlement
11 Conference entered September 24, 2007, Compass and Binford, through their direct
12 representatives and counsel, with the participation of Stuart Madsen, a Direct Lender, the then
13 Loan Captain on the Binford Loan and member of the Board of Binford Lenders LLC, engaged
14 in a settlement conference before the Hon. Mike K. Nakagawa, at which an agreement in
15 principle was reached and read into the record resolving all pending disputes among the parties
16 to this proceeding, subject to certain conditions, all as more fully set forth below.

17 **III. SUMMARY OF SETTLEMENT TERMS**

18 Compass and Binford have agreed to settle this adversary proceeding and other matters
19 relating to and arising from and in connection with the Binford Loan on the terms and subject to
20 the conditions set forth in the attached Settlement Agreement. The following is a summary of
21 the material terms of the Settlement:

22 A. The parties agree that as of November 6, 2007, the allowable debt due
23 and owing by Binford to the Direct Lenders and Compass on the Binford Loan is
24 \$10,521,978.52, with respect to which Binford has no defense or right of offset or
25 recoupment;

26 B. The parties agree that as of November 6, 2007, the “as-is”, fair market
27 value of the Property is approximately \$5.4 million, the liquidation value of the Property
28

1 is approximately \$4.1 million, and the value of the Property on a fully built-out, leased,
2 and stabilized basis, assuming 12 months of marketing, is approximately \$6.66 million;

3 C. Binford will pay Compass (on behalf of the Direct Lenders) the sum of
4 \$5.4 million (the "Discounted Payoff") at a closing date to occur no earlier than the later
5 of (i) the 11th day following the entry of this Court's order approving the settlement, and
6 (ii) March 31, 2008 (the "Closing Date");

7 D. Effective as of the Closing Date, Binford, the Guarantor, and the
8 Contractor will dismiss with prejudice all claims against Compass and the Direct
9 Lenders in the State Court Action currently pending in Indiana;

10 E. Effective as of the Closing Date, Compass and the Direct Lenders will
11 consent to the release to the Contractor of the Fidelity Escrow Amount currently held in
12 the registry of the Indiana State Court;

13 F. Effective as of the Closing Date, Binford, the Guarantor, Compass, and
14 the Direct Lenders will exchange mutual releases and Binford and Compass will file
15 dismissals with prejudice in this adversary proceeding;

16 G. Effective as of the Closing Date, Compass and the Direct Lenders will
17 exonerate and release the Guarantor on his personal guaranty;

18 H. Binford's unsecured claim against the USACM chapter 11 estate shall be
19 allowed in the amount of \$925,000.000; and

20 I. Compass shall not be prevented from, and may, continue to pursue the
21 Foreclosure Action to a judgment or decree of foreclosure; provided, however, that
22 Compass may not schedule or complete a foreclosure sale of the Property on a date on or
23 prior to the Closing Date.

24 The effectiveness of the Settlement is subject to the satisfaction prior to the Closing Date
25 of each of the following conditions precedent: (a) unconditional approval of the Discounted
26 Payoff amount by the Direct Lenders; (b) entry of an Order from this Court approving the
27 Settlement Agreement; (c) approval by the USACM Liquidating Trust of an allowed unsecured
28

claim of \$925,000.00 in favor of Binford; and (d) the Contractor's agreement to dismiss any claims against Compass and the Direct Lenders with prejudice.

IV. LEGAL AUTHORITY AND ARGUMENT

Compass respectfully submits that this Court should approve the parties' Settlement, including the compromise of Binford's claim. Bankruptcy Rule 9019 authorizes the bankruptcy court to approve a compromise or settlement on motion by the trustee after notice and hearing. In a contested matter not otherwise governed by the Bankruptcy Rules, relief shall be requested by motion, and "reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought." Fed. R. Bankr. P. 9019(a). The "plaintiff or moving party must promptly advise the court in writing when any adversary proceeding or contested matter is settled." Local Rule 9019(b). When any party gives notice of a motion for the approval of a compromise, that party must either include in the notice a summary of the essential terms of the compromise or serve a copy of the compromise with the notice. Local Rule 9019(c).

The law favors compromise and not litigation for its own sake. In re A&C Properties, 784 F.2d 1377, 1381 (9th Cir. 1986), *cert. denied sub nom.*, Martin v. Robinson, 479 U.S. 854, 107 S.Ct. 189, 93 L.Ed.2d 122 (1986). Instead, a Court should approve settlements that it finds were negotiated in good faith and are reasonable, fair, and equitable. Id. The Ninth Circuit Court of Appeals has long held that the bankruptcy courts have great latitude in approving compromise agreements. Woodson v. Fireman's Fund Ins. Co., 839 F.2d 610, 620 (9th Cir. 1988). The Court need not conduct an exhaustive investigation into the validity or merits of the claims sought to be compromised between the trustee and creditors. United States v. Alaska National Bank, 669 F.2d 1325, 1328 (9th Cir. 1982). Instead, if the compromise is reasonable, fair, and adequate as determined by: 1) the probability of success in the litigation, 2) the difficulties, if any, to be encountered in the matter of collection, 3) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it, and 4) the paramount interests of the creditors and a proper deference to their reasonable views, the compromise should be approved. A&C Properties, 784 F.2d at 1381.

1 In the instant case, the Settlement was negotiated in good faith. Judge Nakagawa
2 presided over and mediated the parties' settlement conference. Separately and in joint meetings,
3 representatives of Binford and Compass and their respective counsel, as well as a Direct Lender,
4 Stuart Madsen, met with Judge Nakagawa over the course of the negotiations. As a result of the
5 negotiations, the parties were able to reach a mutually acceptable agreement. Judge Nakagawa
6 found that the settlement was reached after "substantial good faith negotiation between the
7 parties." See Transcript of Proceedings, November 6, 2007, pg. 5, lines 1-3, and pg. 10, lines 9-
8 12, attached hereto as **Exhibit B**.

9 The Settlement is reasonable, fair, and equitable. It recognizes the relative strengths of
10 the parties' positions, the current value of the Property, as well as the unique procedural posture
11 of the Adversary Proceeding and the Indiana Action. It resolves all claims asserted in the
12 Complaint and the Counterclaim by awarding Binford a general unsecured claim for some of the
13 damages alleged to have been suffered by Binford by USACM and by authorizing the release of
14 the Fidelity Escrowed Funds to the Contractor. It is important to note that if this Adversary
15 Proceeding is resolved through a trial, a decision in either Binford's or Compass' favor will not
16 resolve the issues associated with Binford's failure to repay the Binford Loan. Compass'
17 foreclosure proceeding would nevertheless go forward, and the Direct Lenders would receive no
18 payment until the foreclosure is completed. This Settlement will result in payment of the Direct
19 Lenders a portion of the Binford Loan amount and avoid the necessity of having to foreclose to
20 enforce the Direct Lenders' security interest in the Property. If the Settlement is not approved,
21 the parties would incur substantial expense both in this Adversary Proceeding and in the Indiana
22 Foreclosure Action.

23 In addition to resolving the claims asserted in the Adversary Proceeding, the Settlement
24 resolves Binford's asserted general unsecured claim, which has been objected to by the
25 Liquidating Trust. A copy of Binford's Proof of Claim, without attachments, is attached hereto
26 as **Exhibit C**. The Binford claim is based solely upon the claims asserted by Binford in this
27 Adversary Proceeding, and a copy of the Binford's Complaint is attached to its Proof of Claim.
28 Approval of this Settlement will save time and money that would otherwise be spent by the

1 trustee of the Liquidating Trust, and therefore benefits the USACM estate. Moreover, the
2 compromise results in the reduction of Binford's claim by more than \$2.5 million, thereby
3 potentially resulting in more money available to other creditors.

4 **V. CONCLUSION**

5 For the reasons stated above, Compass respectfully requests that the Court approve the
6 Settlement on the terms and conditions set forth in the Settlement Agreement, including but not
7 limited to the allowance of general unsecured claim in favor of Binford in the USACM Chapter
8 11 case in the amount of \$925,000.

9 DATED: December 11, 2007.

10 BULLIVANT HOUSER BAILEY, PC

11
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15 Las Vegas, Nevada 89169

16 Attorneys for Compass Financial Partners LLC

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